

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Nicole Furia, :
 :
 Petitioner :
 :
 v. : No. 127 C.D. 2011
 :
 : Submitted: May 13, 2011
 Workers' Compensation Appeal Board :
 (Philadelphia School District), :
 Respondent :

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH

FILED: December 27, 2011

Nicole Furia (Claimant) petitions for review of the January 3, 2011, order of the Workers' Compensation Appeal Board (Board), which affirmed the March 31, 2009, decision of a Workers' Compensation Judge (WCJ) granting Philadelphia School District's (Employer) petition to terminate Claimant's compensation benefits under the provisions of the Pennsylvania Workers' Compensation Act (Act).¹

On May 1, 2003, Claimant sustained a crush injury to the tip of her left index finger in the course and scope of her employment as a teacher of autistic children. Pursuant to a May 14, 2003, Notice of Compensation Payable, Claimant

¹ Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §§1 – 1041.4, 2501 – 2708.

received \$576.32 weekly compensation benefits based upon an \$864.48 average weekly wage. (Finding of Fact No. 1.)²

On July 30, 2007, Employer filed a modification petition alleging that Claimant could return to unrestricted work and had returned to work and that Claimant's injury resolved to a specific loss. Claimant filed an answer to the petition admitting that she returned to work with a wage loss and denying a specific loss. (Findings of Fact Nos. 4, 5.)

The petition was assigned to a WCJ for hearings. At the March 18, 2008, hearing Employer moved to amend the suspension petition, without objection, to include a motion for termination. (Finding of Fact No. 7.); (Reproduced Record (R.R.) at 78a-79a.)

The WCJ's relevant findings of fact may be summarized as follows. James Raphael, M.D., an orthopedic surgeon, performed an independent medical examination of Claimant. Claimant reported that the tip of her left index finger was amputated when a window slammed down on her finger. Claimant's history included surgery for a skin graft of the fingertip with some residual deformity after it healed. Examination revealed a left index finger with a hook nail deformity. Based upon the history obtained, the medical records and studies reviewed, and the examination, Dr. Raphael opined that Claimant has a specific loss of use of the index fingertip/the first phalanx. Dr. Raphael also opined that Claimant had reached maximum medical improvement but will never be fully recovered because she lost a portion of her finger. (Finding of Fact No. 8.)

² Pursuant to a December 5, 2006, WCJ decision, Claimant was awarded temporary total compensation benefits through January 1, 2005, after she started working for a new employer, and partial disability benefits from January 2, 2005 onward for a maximum of 500 weeks. (Findings of Fact Nos. 2, 3.)

Claimant's orthopedic surgeon, John Bednar, M.D., testified that a May 2, 2003, examination revealed an amputation of the distal one-half of the pulp surface of Claimant's left index finger. The nail and the flexor tendon of the finger were intact. In a May 5, 2003, surgery, the wound was debrided to healthy tissue, the remaining fat was advanced to cover the tip of the exposed bone, and a skin graft was taken from the left upper arm to cover the finger. A July 23, 2003, examination revealed that Claimant did not require further surgery or therapy and that Claimant was able to return to her regular work. As a result, Dr. Bednar executed a Notice of Ability to Return to Work releasing Claimant to return to work with no restrictions. (Finding of Fact No. 9.)

Dr. Bednar testified that he next examined Claimant on February 20, 2008, at the request of her attorney. At that time, Claimant's left index finger had a full range of motion, flexed to the palm, and had full extension. The finger had a hook-nail deformity where the nail grew under the skin and matrix supported by the bone. There was minimal sensitivity at the tip and there was no atrophy or paresthesia.³ Grip strength and pinch strength tests revealed that Claimant had not lost the ability to pick up, seize, grasp and hold small objects. Claimant used the finger for normal pinch activities and it had a similar texture as the other fingers. Claimant did not have any difficulty in writing and her slowed fine manipulation was consistent with her injury. (Finding of Fact No. 9.)

Dr. Bednar opined that Claimant can perform the full and regular duties of her position and did not require any additional medical treatment. He also opined that the residual shortened finger with deformity is cosmetic and not functional, and

³ "Paresthesia" is defined, in pertinent part, as "[a]n abnormal sensation, such as burning, pricking, tickling, or tingling." Stedman's Medical Dictionary 1140 (25th Ed. 1990).

that the only functional disability was the slowed fine manipulation. (Finding of Fact No. 9.)

Claimant testified that she did not return to work with Employer after Dr. Bednar's release because Employer could not find her work. Currently she teaches preschool at the Garrett Williamson Foundation earning less than at the time of her work injury. She does not have any problems with the function of her left index finger, and there is nothing that she cannot do or does differently as a result of her injury. Although it might occasionally take her longer to do small buttons or a zipper, it rarely takes her longer to pick up small items. Claimant does not believe that she is fully recovered because she has a deformity and it takes her longer to perform fine motor tasks. She probably was able to pick up small objects and write on the chalkboard more quickly before the injury. However, she feels that she is able to perform her job duties as she did before her injury. (Finding of Fact No. 10.)

The WCJ observed Claimant's left index finger and watched Claimant write. The WCJ noted that Claimant used the finger to write in the same manner as if she had the fingertip. (Finding of Fact No. 11.)

The WCJ accepted as credible Claimant's testimony that she does not have a left index finger function problem, that she uses the finger to write, and that there isn't anything that she can't do or that she does differently as a result of the injury. The WCJ rejected as not credible Claimant's testimony that she has not fully recovered from her injury. (Findings of Fact Nos. 12, 13.)

The WCJ also accepted Dr. Bednar's testimony as more credible and persuasive than that of Dr. Raphael. The WCJ rejected Dr. Raphael's testimony wherever inconsistent with Dr. Bednar's and accepted Dr. Bednar's testimony as fact. As a result, the WCJ found that Claimant did not sustain a permanent loss of use of

her left index finger for all practical intents and purposes. The WCJ also found that all disability related to the work injury had ceased because: Claimant returned to work in her pre-injury position with another employer; Dr. Bednar released her to full and regular duties; Dr. Bednar opined that she did not require any further medical treatment; Claimant admitted that there are no problems with the function of the finger and that there is nothing that she is unable to do or that she does differently as a result of the injury; physical examination was essentially normal but for the deformity of the finger which is cosmetic and not functional; and Claimant uses the finger for its main function, prehension,⁴ even though performing fine manipulation may take longer at times. (Findings of Fact Nos. 14, 15, 17.)

Based on the foregoing, the WCJ concluded that Employer sustained its burden of proving that all disability related to Claimant's work injury had ceased. Accordingly, the WCJ issued an order denying Employer's suspension petition and granting Employer's termination petition.

Claimant appealed to the Board, which affirmed the WCJ's decision. The Board noted that, under Udvari v. Workers' Compensation Appeal Board (USAir, Inc.), 550 Pa. 319, 705 A.2d 1290 (1997), benefits may be terminated where unequivocal medical evidence establishes that the claimant is fully recovered and can return to work without restrictions. The Board also observed that, in Connor v. Workmen's Compensation Appeal Board (Super Sucker, Inc.), 624 A.2d 757 (Pa. Cmwlth.), appeal denied, 535 Pa. 676, 636 A.2d 635 (1993), this Court held that an employer is entitled to a termination of benefits where the claimant's work injury resolves and leaves a minor physical deformity with no functional impairment. The

⁴ "Prehension" is defined as "[t]he act of grasping, or taking hold of." Stedman's Medical Dictionary 1252 (25th Ed. 1990).

Board further noted that Dr. Bednar's credited testimony established that, despite the deformity, Claimant had not lost the functional use of her left index finger, her injury had resolved for all purposes of normal use, and she was able to work in her pre-injury position without restrictions. The Board concluded that Employer was entitled to a termination of benefits under Connor because Claimant's injury resolved into minor physical deformity with no functional impairment. Accordingly, the Board affirmed the WCJ's decision. Claimant then filed the instant petition for review.⁵

In this appeal, Claimant contends that the Board erred in affirming the WCJ's termination of benefits because the credible evidence does not demonstrate that her work injury has entirely ceased. Claimant also asserts that the Board erred in relying on Connor because the evidence in this case demonstrates that her injury has not resolved into a minor physical deformity with no functional impairment. We do not agree.

⁵ This Court's scope of review is limited to determining whether findings of fact were supported by substantial evidence, whether an error of law was committed or whether constitutional rights were violated. Meadow Lakes Apartments v. Workers' Compensation Appeal Board (Spencer), 894 A.2d 214, 216 n. 3 (Pa. Cmwlth. 2006). "Substantial evidence" is such relevant evidence as a reasonable person might accept as adequate to support a conclusion. Waldameer Park, Inc. v. Workers' Compensation Appeal Board (Morrison), 819 A.2d 164, 168 (Pa. Cmwlth. 2003); Hoffmaster v. Workers' Compensation Appeal Board (Senco Products, Inc.), 721 A.2d 1152, 1155 (Pa. Cmwlth. 1998). In performing a substantial evidence analysis, the evidence must be viewed in a light most favorable to the party who prevailed before the WCJ. Waldameer Park, Inc.; Hoffmaster. It is immaterial that there is evidence in the record supporting a factual finding contrary to that made by the WCJ; rather, the pertinent inquiry is whether there is any evidence which supports the WCJ's factual finding. Waldameer Park, Inc.; Hoffmaster. It is solely for the WCJ to assess credibility, to resolve conflicts in the evidence, and to determine the weight to be given to any evidence. Id., 721 A.2d at 1155-56. The WCJ may reject the testimony of any witness in whole or in part even if that testimony is uncontradicted. Id. at 1156. This Court is precluded from disturbing the WCJ's findings of fact if they are supported by substantial evidence notwithstanding evidence to the contrary or that we may have resolved the evidentiary conflicts differently. Callahan v. Workmen's Compensation Appeal Board (Bethlehem Steel Corp.), 571 A.2d 1108, 1110 (Pa. Cmwlth. 1990).

An employer seeking to terminate workers' compensation benefits bears the burden of proving either that the employee's disability⁶ has ceased or that any current disability arises from a cause unrelated to the employee's work injury. Campbell v. Workers' Compensation Appeal Board (Antietam Valley Animal Hospital), 705 A.2d 503, 506-07 (Pa. Cmwlth. 1998). Termination is proper where the WCJ credits an employer's unequivocal medical testimony that the employee is fully recovered and can return to work without restrictions and that there are no objective medical findings to substantiate complaints of continuing pain or to connect them to the work injury. Udvari, 550 Pa. at 327, 705 A.2d at 1293.⁷

In Connor, the claimant suffered a loss of muscle mass in his right thigh when the tailgate of a dump truck fell and struck his leg. On appeal, the claimant alleged that benefits should not be terminated because the medical expert who released him to return to work also admitted that the claimant had residual problems from the injury. This Court noted that the expert "[m]ade it clear that he believed that claimant was 'functionally' the same as before the injury, *i.e.*, claimant would have no problems performing any physical activity which he could perform before the injury." Connor, 624 A.2d at 758. We held that in such a case, the presence of a permanent minor physical deformity does not preclude the termination of benefits. Id. See also Wagner v. Workers' Compensation Appeal Board (O'Malley Wood

⁶ "Disability" is synonymous with a "loss of earning power" in workers' compensation law. Scobbie v. Workmen's Compensation Appeal Board (Greenville Steel Car Company), 545 A.2d 465, 466 (Pa. Cmwlth. 1988), appeal denied, 522 Pa. 606, 607, 562 A.2d 828, 829 (1989).

⁷ An employer's burden of proof in this regard may be satisfied by evidence presented by the claimant. SKF USA, Inc. v. Workers' Compensation Appeal Board (Smalls), 728 A.2d 385, 388 n. 3 (Pa. Cmwlth.), appeal denied, 561 Pa. 663, 747 A.2d 903 (1999) (holding that a party's burden may be met where the necessary proof is introduced by its adversary).

Products, Inc.), 805 A.2d 683, 685 (Pa. Cmwlth. 2002), appeal denied, 573 Pa. 675, 821 A.2d 589 (2003) (holding that the evidence supported a finding of full recovery even though the claimant had undergone a fusion of L4-5 vertebrae where the claimant was functionally the same because he suffered no loss of his range of motion as a result of the fusion).

As noted above, in this case the WCJ found as fact that all disability related to the work injury had ceased because: Claimant returned to work in her pre-injury position with another employer; Dr. Bednar released her to full and regular duties; Dr. Bednar credibly opined that she did not require any further medical treatment; Claimant admitted that there are no problems with the function of the finger and that there is nothing that she can no longer do or that she does differently as a result of the injury; physical examination was essentially normal but for the deformity of the finger, which is cosmetic and not functional; and Claimant uses the finger for its main function, prehension, even though performing fine manipulation may take longer at times. (Findings of Fact Nos. 12, 13, 14, 15, 17.)

When viewed in a light most favorable to Employer, the record amply supports the foregoing findings of fact. (R.R. at 37a-41a, 50a-51a, 67a-70a, 72a, 75a-78a.)⁸ Dr. Bednar testified that Claimant does not require any further treatment for her injury and that she can fully perform the functions of her position with Employer. (Id. at 48a-49a). In addition, as in Connor, both Dr. Bednar and Claimant specifically stated that she has not lost the full and normal function of the finger. (Id. at 40a-41a, 68a-70a.) These findings support the WCJ's grant of Employer's termination

⁸ Because these findings are supported by substantial evidence, they will not be disturbed on appeal even though there may be record evidence to the contrary. Callahan, 571 A.2d at 1110.

petition. Connor, 624 A.2d at 758.⁹ As a result, the Board did not err in affirming the WCJ's decision in this case.

Accordingly, the Board's order is affirmed.

PATRICIA A. McCULLOUGH, Judge

⁹ As this Court explained in Grabish v. Workmen's Compensation Appeal Board (Trueform Foundations, Inc.), 453 A.2d 710, 712 (Pa. Cmwlth. 1982) (citation omitted):

Claimant on the other hand contends that if the fracture still exists as [Employer's medical expert] concedes, and it was the fracture which caused the disability in the first place, then the disability must still be present and Employer failed to meet his burden of proving that Claimant's disability had ceased. We disagree with this analysis. As we have stated numerous times, "disability" within the meaning of the [Act] encompasses more than mere medical disability. Many factors enter into its determination including a claimant's loss or diminution in earning power. Merely because the non-union of a bone is present is not determinative on the issue of whether Claimant can return to work. In the instant case [Employer's expert] stated that Claimant had minimal symptoms as of the date of his exam. It is for that reason [Employer's expert] opined that Claimant could return to work.

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ORDER

AND NOW, this 27th day of December, 2011, the January 3, 2011, order of the Workers' Compensation Appeal Board is affirmed.

PATRICIA A. McCULLOUGH, Judge